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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1953. No.

MARVIN L. GEHMAN,
Petitioner,

vs.

FRANCIS R. SMITH, Collector of Internal Revenue,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Marvin L. Gehman respectfully represents:

SUMMARY STATEMENT OF THE FACTS.

This case questions the constitutionality of the tax on watered butter. In practice, makers sometimes reduce or

increase moisture content in order to meet competition in the market.[1]

In the first half of the year 1946, butter was a scarce commodity on the market. The petitioner, Marvin L. Gehman, operated a creamery in the basement of his farm home, in the upper part of Montgomery County, Pennsylvania.

On his own account, he purchased cream from farmers which he made into butter. He also bought tub butter from the West, which he re-churned, adding salt to taste. His butter was then put up into quarter pound prints. Samples of his product, purchased by the Inspector of the U. S. Food and Drug Administration and the Internal Revenue Agent, showed moisture content as high as 23%.

In addition, other persons supplied him with cream which he made into butter under instructions to make as much butter as it was possible to produce from the cream. For this work, he was paid 3¢ per pound. This contained as much as 35.21% moisture.

A special or license tax was then assessed under Section 3206 (a) (2) of the Internal Revenue Code, and excise or commodity taxes under Section 2321 at the rate of 10¢ per pound; in all, $4,037.40. An injunction being denied,[2] the petitioner sold his home, paid the tax, duly filed claim for refund and brought the present action when the claim was denied. On this issue, the District Court found for the defendant,[3] and the Court of Appeals affirmed.[4]

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[1] This sentence is an admission under Rule 36 (9a), and is a direct quotation from **Lynch v. Tilden Produce Co.**, 265 U. S. 315, 319 (1924).

[2] Injunction case, **Gehman v. Smith**, 76 F. Supp. 805.

[3] District Court, present action, **Gehman v. Smith**, 105 F. Supp. 604. Tax was also assessed on a product known as "plastic cream" in amount of $252.00 for which judgment was given to plaintiff.

[4] Court of Appeals, present action, **Gehman v. Smith**, 203 F. 2d.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was filed April 16, 1953. The jurisdiction of your Honorable Court is invoked under the Act of June 25, 1948, Chapter 646, 62 Stat. 928 (28 U. S. C. A. 1254).

QUESTIONS PRESENTED.

1. May Congress impose a tax on the abnormal, without setting up a standard of normality?

2. Even with a standard of normality defined by Congress, can an excise be imposed on the abnormal as distinguished from the normal?

3. May Congress impose an excise on an act intentionally done; exempting the same act unintentional?

REASONS FOR GRANTING THE WRIT.

Your Honorable Court has found two limits on the power of Congress to tax:

1. It may not tax the abnormal and exempt the normal.

2. It may not tax the intentional and exempt the unintentional.

The tax here violates both rules. Unless your great predecessors were wrong, the Tenth Amendment is abrogated and all conduct in the states can be regulated by Congress.

For which reasons your petitioner prays that a writ of certiorari issue *sec. leg. et sec. reg.*

MARVIN L. GEHMAN,
Petitioner,
By: HENRY D. O'CONNOR,
Attorney for Petitioner.

PETITIONER'S BRIEF.

Normalcy.

We are here concerned with the constitutionality of two companion sections of the *Internal Revenue Code*, the critical phrase and the words upon which the tax involved was assessed and paid being the concluding phrase of *Section 2320 (b)* which assess the taxes under both sections upon:

> "* * * any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk, or cream." [5]

Note the words "abnormal," and "intent." To them we direct our argument.

Nor do we suggest that the Constitution of the United States is ever openly flouted by those sworn to uphold and defend it.[6] We can find no instance in which the Executive nor the Congress was held by your Honorable Court to have exceeded their powers in obvious disregard of the constitutional limitations on those powers. When you have found such error, it is usually subtle, perhaps a slight or restricted abuse of power, but once present you have found the whole tainted with unconstitutionality and void.

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[5] That this statute has been on the books unchanged since 1886 should not deter your Court. A courageous Philadelphia jurist recently set aside the **Statute of 34 Edward III, C. 1** (1360); see: **"The Franklin Case, A Short Tale of Six Centuries,"** 24 Pa. Bar Ass'n Quarterly 193; **Comm. v. Franklin,** 172 Pa. Superior 152, 92 A. 2d 272.

[6] We all have a "most solemn" "oath registered in heaven" "'to preserve, protect and defend'" the Constitution of the United States. Abraham Lincoln's First Inaugural Address.

This was the case with the *Child Labor Tax Law*, 259 U. S. 20, 3 AFTR 3156. On the surface, this was a carefully and skillfully phrased tax law; but, buried in its provisions and in exemption from the tax were a few words, one of which was sufficient to bring down the condemnation of the entire law by your Court in an opinion by Mr. Chief Justice Taft; on which we here rely. Of the eight sections in that law, it was only subsection (b) of Section 1203, that was fatally defective; quoted here as reported in 259 U. S. 20 at page 35:

> "the tax imposed by this title shall not be imposed in the case of any person who proves to the satisfaction of the Secretary that the only employment or permission to work which but for this section would subject him to the tax, has been of a child employed or permitted to work under a mistake of fact as to the age of such child and without intention to evade the tax."

The entire tax was set aside because of that word: "intention."

Here we have a tax on "abnormal" butter. *There is no definition of abnormal butter in the Act.* Imagination knows no limit of what Congress could do if it decides to tax the abnormal and exempt the normal. As the old Quaker said to his wife, "Methinks the whole world is queer, Martha, except me and thee, and I have my doubts at times about thee."

> "Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it.

> To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states."

This is *your* answer to a tax on the "abnormal:" *Child Labor Tax Case, supra,* at page 38. As to the tax here under consideration, Congress did not define "abnormal" butter, but left even that to the Commissioner of Internal Revenue; who was thereby put in an impossible position, and wrote the following Regulation:

> "* * * but the normal content of moisture permissible is not fixed by the act. This being the case it becomes necessary to adopt a standard for moisture in butter, which shall in effect represent the normal quantity. It is therefore held that butter having 16 per cent. or more of moisture contains an abnormal quantity and is classed as adulterated butter."

We agree that the Commissioner was right in his conclusion that it is *necessary to adopt a standard* for the water content of butter to attain the certainty needed for taxation; but Congress did not do it, and the Commissioner cannot —for his above quoted attempt to do so was held invalid by your Honorable Court in

Lynch v. Tilden Produce Co., 265 U. S. 315.

You found as a fact that water *is at all times a normal part of butter.* As to the quantity, you held:

> "In practice, makers sometimes reduce or increase moisture content in order to meet competition in the market." 265 U. S. 315 at page 319, also 9a.

The *rationale* of your decision in that case is that the taxing statute does not state at what point the hand of the

buttermaker should stop when he is increasing the moisture content of his product.[7] We do not question in the slightest degree the right of Congress to levy excise taxes *on commercial transactions of any nature,* including commercial vice; but we do question, under the authority of these decisions of the Supreme Court of the United States, its right to tax abnormality or intent. Commercial dealing in firearms or narcotics is taxed just like any other business transaction, such as the sale of an automobile or the sale of cosmetics. I even concede that Congress could impose a tax on homicide for hire, with appropriate exemptions to the armed forces and executioners. Any business can be subjected to an excise. *If Congress had imposed*—in so many words—*a tax on all butter with more than 16% moisture we would not be here today.*

It was the complete absence of such a provision in the taxing statute itself, which caused you to reject the Regulation which the Commissioner of Internal Revenue had held "necessary to adopt a standard for moisture in butter." We can only speculate as to why Congress did not set a definite standard for taxation after your decision that such a standard was necessary. Perhaps this failure to substitute something more definite than "abnormal" as a basis for taxation, was because *by that time* the penal statutes adequately covered the subject of watered butter, interstate and intrastate.[8]

To use his own words again, while it was still "necessary to adopt a standard for moisture in butter," the Commissioner in 1936 issued:

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[7] We are not concerned here with the penal statutes, federal and state, which state with exactness, that butter must contain 80% milk fat.

[8] Food and Drugs Act, 21 U. S. C. A. 6, Mar. 4, 1923. Penna. 31 Purdon's Statutes 63, April 13, 1921.

REGULATIONS No. 9
relating to the
TAXES ON OLEOMARGARINE
ADULTERATED BUTTER
AND PROCESS OR
RENOVATED
BUTTER

the pertinent portion of which is:

> "Art. 100. * * * (2) Butter churned and worked in accordance with approved standards, and with quality as a prime object, contains not more than 16 per cent moisture. As defined by the Food and Drugs Act of March 4, 1923, butter contains not less than 80 per cent, by weight, of milk fat, allowance being made for all tolerances. When butter contains a smaller quantity of milk fat or more than 16 per cent moisture, a strong presumption is raised that the product is adulterated butter within the meaning of the statute."

There is no substantial distinction between the Regulation you rejected in *Lynch v. Tilden Produce Co., supra,* which said (265 U. S. 315, 319):

> "It is therefore held that butter having 16 per cent or more of moisture contains an abnormal quantity and is classed as adulterated butter."

and that under which the tax was assessed in the case at bar:

> "Butter churned and worked in accordance with approved standards, and with quality as a prime objective, contains not more than 16 per cent moisture."

That is *the first premise of a syllogism leading to the conclusion* that butter containing more than 16 per cent mois-

ture is adulterated. *Quantity* was the prime object here. The 1936 Regulation is condemned by the logic of *Lynch v. Tilden Produce Co., supra,* with as much force as the earlier "necessary" Regulation. It still remained the duty of Congress to fix in the tax law itself a standard of taxation; and not merely to say "abnormal," when the quantity of moisture in butter depends on market conditions and is always under the control of the butter-maker. Congress had to say what was taxed and what was not. This Congress has not done. A tax law should be "plain upon tables, that he may run that readeth it:" Habakkuk, C. 2 v. 2.

Intent.

The tax we here question is the unrepealed vermiform appendix of the Oleomargarine Tax Law. The *yellow* oleomargarine tax was upheld in

McCray v. United States, 195 U. S. 27.

Note that neither abnormality nor intent were necessary to generate that tax; which read:

> "Upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected a tax at the rate of one-fourth of 1 cent per pound, to be paid by the manufacturer thereof; except that such tax shall be at the rate of 10 cents per pound in the case of oleomargarine which is yellow in color."

Sec. 8 (a), Act of August 2, 1886, as amended; *Internal Revenue Code,* Sec. 2301 (Repealed Mar. 16, 1950). No matter how the oleomargarine became yellow, if yellow it was the tax was due. If the wind or the weather made it yellow, the tax was due; but *there was a certain and definite standard of taxation: yellowness.* Your Honorable Court

pointed out this difference as the distinguishing element between the tax on yellow oleomargarine, and the Child Labor Tax when deciding the latter case. The distinction is vital. We repeat, if Congress had imposed a tax on all butter with more than 16% moisture, it would be within its power. But Congress taxed abnormal (?) butter; and even then only butter *intentionally* abnormal.

There is a *complete analogy* between the case at bar and the *Child Labor Tax Case, supra.* With the Child Labor Tax the Treasury Agents went out teamed with agents of the Department of Labor; here they work as a team with agents of the Food and Drug Administration. In that case an employer violating the tax statute was "to pay to the government one-tenth of his entire net income in the business for a full year." Here, the petitioner receives 3¢ and pays the government 10¢. On the vital *intent* feature, there an employer was exempt in the case of

> "a child employed or permitted to work under a mistake of fact as to the age of such child and without *intention* to evade the tax."

Here, and we quote the statute and not the regulation, petitioner does not have to pay if he made his butter

> "in the manufacture or manipulation of which any process or material is used with (no) intent or effect of causing the absorption of abnormal (?) quantities of water, milk, or cream; * * *"

The words of Mr. Chief Justice Taft in the *Child Labor Tax Case, supra,* are controlling here (259 U. S. 20, at p. 37):

> "* * * That is to say, it is only where he knowingly departs from the prescribed course that payment is to be exacted. Scienters are associated with penalties, not with taxes. The employer's factory is to be subject to inspection at any time not only by the taxing

> officers of the Treasury, the Department normally charged with the collection of taxes, but also by the Secretary of Labor and his subordinates, * * *"

The Child Labor Tax was thereupon stricken down because of that one word "intention" in Section 1203:

> "The tax imposed by this title shall not be imposed in the case of any person who proves to the satisfaction of the Secretary that the only employment or permission to work which but for this section would subject him to the tax, has been of a child employed or permitted to work under a mistake of fact as to the age of such child and without *intention* to evade the tax."

Succinctly stated, that case is therefore authority for the rule that Congress cannot tax the intentional and exempt the unintentional.

Conclusion.

The statutory provisions before the Court in this case are the only unrepealed sections of the oleomargarine tax law. Its enforcement has dwindled down to three offices in the entire country (18a). The manufacture and sale of butter containing excessive moisture is adequately punished by federal penal law when interstate commerce is involved, and by the state penal law as to intrastate commerce.

Your Court should reiterate that a taxing statute is unconstitutional when it taxes the abnormal and intentional, exempting the normal and the unintentional.[9]

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[9] The District Court and the Court of Appeals gave no answer to this argument. I recall the regret of a professor of constitutional law that no answer was given to Elihu Root's argument that Article V had implied limitations restricting amendments establishing a state religion or changing our form of government: **National Prohibition Cases, 253 U. S. 350, 365.**

Suppose, to meet the vigorous competition on the market today from yellow oleomargarine, Pennsylvania decides that 25% water is all right for its butter. Would that be normal for Pennsylvania, and abnormal for the other 47 states?

It is on its face not a revenue raising measure, but an attempt to regulate commerce within the states—a direct violation of Article 1, Section 8, of the Constitution of the United States, and of the 10th Amendment.

In its operation, it permits administrative officers to estimate penalties in the guise of a "tax,"—which is not due process of law and violates the 5th Amendment of the Constitution of the United States.

It is respectfully submitted that the petition for writ of certiorari should be granted.

HENRY D. O'CONNOR,
Attorney for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 135

MARVIN L. GEHMAN, PETITIONER

v.

FRANCIS R. SMITH, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 19a-22a) is reported at 105 F. Supp. 604. The opinion of the Court of Appeals (R. 29) is reported at 203 F. 2d 953.

JURISDICTION

The judgment of the Court of Appeals was entered on April 16, 1953. (R. 30.) The petition for a writ of certiorari was filed on June 20, 1953. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the tax levied by Sections 2320, 2321, and 3206 of the Internal Revenue Code upon a manufacturer of adulterated butter and upon the product itself are constitutional.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the applicable statute and regulations are set forth in the Appendix, *infra*, pp. 7-8.

STATEMENT

During the period January 1, 1946, to June 30, 1946, the taxpayer produced adulterated butter within the meaning of Section 2320(b) of the Internal Revenue Code (Appendix, p. 7 *infra*), by causing the butter produced to absorb an abnormal quantity of water in processing. (R. 20, 23-27.) Taxpayer, therefore, was a manufacturer of adulterated butter within the meaning of Section 3206 (a)(2) of the Internal Revenue Code (Appendix, p. 8, *infra*) (R. 21.)

On November 1, 1946, the Collector of Internal Revenue assessed a tax of $4,289.40 against the taxpayer under Sections 2321 and 3206. Taxpayer brought a suit to restrain the collection of this tax, alleging that the tax was unconstitutional. The District Court dismissed that action and no appeal was taken by the taxpayer. *Gehman* v. *Smith*, 76 F. Supp. 805 (E.D. Pa.). Taxpayer thereupon paid the amount of the assessed taxes, and brought suit for their return, after the Commissioner of Internal

Revenue rejected his claim for refund, again alleging that the tax was unconstitutional. (R. 19-20.) The District Court held that Sections 2321 and 3206 of the Internal Revenue Code are valid exercises of the taxing power of the United States and that $4,037.40 of the tax was properly assessed and collected. It held improper an assessment of $252 upon plastic cream reworked by the taxpayer (R. 21-22.) On the taxpayer's appeal, the Court of Appeals for the Third Circuit affirmed *per curiam*. (R. 29.)

ARGUMENT

Taxpayer's principal contention, that the relevant sections of the Internal Revenue Code are an unconstitutional exercise of the federal taxing power, is without merit. The tax was properly assessed under the Code and regulations, and its imposition presents no question calling for review by this Court.

1. Taxpayer insists that the statute draws an unconstitutional distinction between an unintentional and intentional manufacture of adulterated butter. But, first, the statute draws no such distinction. It defines as adulterated butter (Sec. 2321):

> any butter in the manufacture or manipulation of which any process or material is used with intent *or effect* of causing the absorption of abnormal quantities of water, milk, or cream. (Emphasis supplied.)

It is, of course, quite possible for a process or material to have an effect upon the absorption of water, without there being an intent to have such an effect.

Here, the District Court found as a fact that taxpayer had manufactured butter with both the intent *and* the effect of causing the abnormal absorption of water. Taxpayer's constitutional argument, which is mainly based on this incorrect reading of the statute, must therefore fail.

But even if such a distinction had been drawn by the statute, there would be no Constitutional difficulty. This is not like the *Child Labor Tax Case,* 259 U.S. 20, where the tax was added as a penalty for breach of a regulation concerning activities in themselves subject only to state regulation. *United States* v. *Kahriger,* 345 U.S. 22, 31. Petitioner concedes (Pet. 8) that Congress has the right to "levy excise taxes on commercial transactions of any nature." Accordingly, as the tax here falls in this category, the alleged constitutional infirmity of the *Child Labor Tax Case* is not present.

As this Court stated in *McCray* v. *United States,* 195 U.S. 27, 59:

> Since * * * the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise. * * *

Undoubtedly every tax which lays its burden on some and not on others may have an incidental regulatory effect. But since that is an inseparable concomitant of the power to tax, the incidental regulatory effect is contained within the power to impose the tax. It has long been settled that an

Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed. *United States* v. *Kahriger, supra,* at 27-31; *United States* v. *Sanchez,* 340 U. S. 42; *Sonzinsky* v. *United States,* 300 U. S. 506; *United States* v. *Doremus,* 249 U. S. 86.

2. Taxpayer contends (Pet. 7-9), citing *Lynch* v. *Tilden Produce Co.,* 265 U. S. 315, that the definition of adulterated butter set forth in the statute is too vague. This contention, too, is without substance.

In that case, this Court found invalid a regulation which defined "adulterated butter" merely as being any butter with over 16 per cent water content. This regulation, as the Court held, was inconsistent with the statute, which required that the abnormal quantities of water be the result of manufacture or manipulation by a process or with a material. The regulation was, accordingly, revised in 1925 to its present form, Article 101(3) of Regulations 9 (Appendix, p. 8 *infra*). It now requires, in the terms of the statute, that the abnormality be the result of manufacture or manipulation by a process or material.

Here, taxpayer admitted that "at the beginning I made legal butter but after about two weeks", rechurned the butter and added water. The finished product contained from 33 per cent to 35 per cent water. (R. 24-25.) [1] Without any doubt, the tax-

[1] Taxpayer errs in attacking (Pet. 9-10) the validity of Article 100(2) of Regulations 9. The tax here was imposed under Article 101(3), and Article 100(2) is irrelevant.

payer was a manufacturer of "adulterated butter" within the meaning of the statute and regulations. The supposed conflict with *Lynch* v. *Tilden Produce Co.* does not exist.

CONCLUSION

The decision below is correct. There is no conflict of decisions. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

OSCAR H. DAVIS,
Acting Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.
ELLIS N. SLACK,
A. F. PRESCOTT,
JOHN J. KELLEY, JR.,
Special Assistants to the Attorney General.

JULY, 1953

Internal Revenue Code:

Sec. 2320. Definitions.

(a) *Butter.*—For the purpose of this chapter and sections 3206, and 3207, the word "butter" shall be understood to mean the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter.

(b) *Adulterated Butter.*—"Adulterated butter" is defined to mean a grade of butter produced by mixing, reworking, rechurning in milk or cream, refining, or in any way producing a uniform, purified, or improved product from different lots or parcels of melted or unmelted butter or butter fat, in which any acid, alkali, chemical, or any substance whatever is introduced or used for the purpose or with the effect of deodorizing or removing therefrom rancidity, or any butter or butter fat with which there is mixed any substance foreign to butter as defined in subsection (a), with intent or effect of cheapening in cost the product or any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities or water, milk, or cream.

* * * * *

(26 U.S.C. 1946 ed., Sec. 2320.)

Sec. 2321. Tax.

(a) *Rate.*—

(1) *Adulterated butter.*—Upon adulterated butter, when manufactured or sold or removed for consumption or use, there shall be assessed and collected a tax of 10 cents per pound, and any fractional part of a pound shall be taxed as a pound.

* * * * *

(26 U.S.C. 1946 ed., Sec. 2321.)

Sec. 3206. Tax.

(a) *Manufacturers.*—

* * * * *

(2) *Adulterated butter.*—Manufacturers of adulterated butter shall pay a special tax of $600 a year.

* * * * *

(26 U.S.C. 1946 ed., Sec. 3206.)

Treasury Regulations 9 (Revised April 1936):

Art. 101. *Adulterated butter classified.*—Adulterated butter may be divided into three classes, namely:

* * * * *

(3) Butter manufactured or manipulated by any process or with any material resulting in the absorption of abnormal quantities of water, milk, or cream. Emulsified or milk-blended butter comes within this class.

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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1953. No. 135.

MARVIN L. GEHMAN,

Petitioner,

VS.

FRANCIS R. SMITH, Collector of Internal Revenue,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONER'S REPLY BRIEF.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The misleading statements in the Brief for the Respondent should not go unanswered; hence this Reply Brief.

It is true that petitioner raised these constitutional questions in his application for an injunction against collection of this tax. When his prayer for injunction was refused, he sold his home and paid the tax and filed claim for refund.

It would have been more appropriate to punish him with a jail sentence than to deprive his family of the roof over their heads.

But we are not here seeking sympathy. The petitioner is not a cipher when he stands here with the Constitution in his hand, and says (*and it is not denied*) there is *no case* where an administrative officer's concept of what is *"normal"* supports the imposition of a tax; nor where the *"intent"* of a taxpayer is the basis of the assessment (as distinguished from a civil sanction). This is an important and fundamental question of constitutional law.

We have carefully and *correctly* read *every word* of the statute involved, including the word *"effect."* The water in the butter in *Lynch v. Tilden Produce Co.*, 265 U. S. 315, of course had to have an *effect* on the product; but you logically decided that the Commissioner had no right to determine what was "normal" and not subject to tax, and what was "abnormal" and therefore taxable (if also intentional).

All the taxes cited by the respondent were upheld because they are *ordinary business excises on their face. There is no tax* predicated on "abnormal" or "intentional" dealing in narcotics, firearms or engaging in the business of gambling.

> "Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it."
>
> *Child Labor Tax Case*, 259 U. S. 20, 38.

It is respectfully submitted that means Congress can not tax abnormality. Certainly, the Commissioner can not do so; for you so held, in *Lynch v. Tilden Produce Co.*, supra.

HENRY D. O'CONNOR,
Attorney for Petitioner.

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IN THE

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FRANCIS R. SMITH, Collector of Internal Revenue, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Marvin L. Gehman respectfully represents:

In his *petition for writ* of certiorari (denied on October 12, 1953), your petitioner challenged the right of Congress to impose an excise tax on the abnormal—exempting the normal, and its right to impose an excise tax on the inten-

tional—exempting the unintentional; citing authority[1] that such a "tax" would effectively regulate commerce and conduct within the states in violation of Article 1, Section 8, of the Constitution, and the 5th and 10th Amendments; and pointed out that the narcotics, firearms, gamblers and other such taxes contain no such nebulous standards but are commercial business taxes no different from the tax on automobiles.

The petitioner seeks refund of $4,037.40 paid as tax on watered butter.

The grounds, on which this *petition for rehearing* is predicated, are:

I.

Intervening circumstances. There has been public discussion that Congress shortly may broaden the present excise taxes. It seems only fair to Congress and the citizens that the extent of the power to impose such taxes should be re-stated, if your old decisions are not to be followed.

II.

Other substantial grounds. The ground of *stare decisis. Lynch v. Tilden Produce Co.*, 265 U. S. 315, decided more than the mere fact that the *Produce Company* was entitled to a refund of $936 tax paid on watered butter. The *principle* enunciated in that case is that *where the Congress has not prescribed any standard for taxation* (the amount of moisture in butter) *the Commissioner of Internal Revenue may not do so.* In that case, and in this case, we have this fact:

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[1] **Child Labor Tax Case, 259 U. S. 20.**

> "In practice, makers sometimes reduce or increase moisture content in order to meet competition in the market."

When he is increasing moisture content, the tax law does *not* state at what percentage the hand of the butter-maker shall stop.[2]

After your decision in that case (Congress not having changed the law to read that butter with a *certain* percentage of water is taxable, which we believe would be lawful), the Commissioner merely rephrased his old Regulations and we respectfully submit went right along in practical disregard of your decision. I believe that, just as the Commissioner said in his original Regulation, it is still

> "* * * necessary to adopt a standard for moisture in butter."

The regulation held unlawful in *Tilden Produce Co.* was a necessary regulation. Less than that was impossible. Unless the *principle* of that case is followed, the impossible has become possible, and the petitioner has not received equal justice with the *Tilden Produce Co.*

Wherefore your petitioner prays your Honorable Court to grant rehearing of his petition for a writ of certiorari, and upon such rehearing to grant the prayer of his petition.

MARVIN L. GEHMAN, *Petitioner,*
By: HENRY D. O'CONNOR,
Attorney for Petitioner.

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[2] That **Gehman** added back more water than **Tilden** has no bearing on the **principle** involved, which was not based on the amount of water in **Tilden's** butter.

CERTIFICATE OF COUNSEL.

I hereby certify that this petition for rehearing is presented in good faith, and not for delay; and I further certify that it is restricted to the grounds:

(1) Of the great public interest in the limitation of the right of Congress to impose excise taxes on the abnormal and intentional.

(2) The ground of *stare decisis*.

HENRY D. O'CONNOR,
Attorney for Petitioner.